KITIGAN ZIBI ANISHINABEG
P.O. Box 309, Maniwaki, QC J9E 3C9 Tel: (819) 449-5170 Fax: (819) 449-5673

Comments on the government's Discussion Paper

Federal Review of Environmental and Regulatory Processes

Submitted via Discussionpaper.ca
Presented by:
Kitigan Zibi Anishinabeg
Natural Resource and Wildlife Department

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The Kitigan Zibi Anishinabeg community presents these comments in regards to the government's Discussion Paper on the Review of Environmental and Regulatory Processes. Kitigan Zibi Anishinabeg wishes to affirm that the *Canadian Environmental Assessment Act*, 2012, the *National Energy Board Act*, the *Navigation Protection Act*, and the *Fisheries Act* cover ancestral Algonquin Anishinaabe lands that were never surrendered, nor for which we have ever signed a treaty. We continue to assert our full rights to our land and seek respect from all those that reside in and/or use these lands. These comments are submitted without prejudice to our collective asserted rights. Finally, these comments are not intended to provide an inventory of our Algonquin Anishinaabe values in regards to the targeted territory, and should not be used or viewed as our all-encompassing position.

This submission builds upon comments developed by the Assembly of the First Nations of Quebec and Labrador Sustainable Development Institute (AFNQLSDI). We thank the AFNQLSDI for their assistance.

BACKGROUND

In January 2016, the government of Canada announced its intention to implement a global strategy to review Canada's environmental assessment and regulatory processes in order to restore public confidence in those processes. On June 20, 2016, it launched the Review of Environmental and Regulatory Processes, in which four components are examined:

- the federal environmental assessment process and the *Canadian Environmental Assessment Act* (CEAA 2012);
- the modernization of the NEB;
- the *Fisheries Act*;
- the *Navigation Protection Act*.

Between February and May 2017, the mandated expert and parliamentary committees tabled their report of recommendations with the responsible authorities. On the basis of these reports and on the wealth of information gathered in the last year, the federal government published a Discussion Paper that it made public on June 29, 2017. This Discussion Paper presents broad goals and orientations which will be used to direct the future legislative, regulatory and political changes to be implemented in the context of the Review of Environmental and Regulatory Processes.

Following the publication of its Discussion Paper, the government allocated two months to the public and to First Nations, until August 28th 2017, to comment on it. Meetings have also been held in person and by teleconference between the concerned departments and First Nations in order to facilitate the comprehension of the proposed approach and to obtain feedback.

COMMENT ON THE DISCUSSION PAPER

This document comments on the proposals of the government in its Discussion Paper and identifies the elements that, in regards to the First Nations issues, are positive or should be abandoned, modified or specified. Indeed, although the expert committees were proposing a comprehensive reform of environmental and regulatory processes and the modernization of the National Energy Board (NEB) in its Discussion Paper, the federal government proposes instead improvements to existing processes and fails to address some major issues for First Nations.

The limited time allowed for this phase of the Review does not permit for concrete recommendations to be made on legislative, political or program changes that should be made. Only two months were allocated to First Nations, in a summer period, to analyze the proposed approach and to make their recommendations for addressing the gaps that remain regarding the adequate integration of their rights and interests. The time allowed does not allow for meaningful participation of First Nations, although this participation is a central issue in this Review. Therefore, further work is required, in collaboration with First Nations, to ensure that the orientations and the guiding principles of the Review are implemented.

ENVIRONMENTAL ASSESSMENT: SEEKING YOUR VIEWS

In May 2016, the Federal Environmental Assessment Reform Summit took place in Ottawa. At this summit, over 30 experts from across the country created a list of twelve pillars of next-generation environmental assessment that should be incorporated into building a stronger, more credible EA framework for Canada[1]. The changes proposed in the Discussion Paper only partially incorporate these guiding principles, such as transparent and accessible information flows.

What are the gaps in our national environmental frameworks and what geographic areas should first be examined for regional assessments?

The sustainability principle must be a core objective of all national environmental frameworks. The ecosystem concept should be a core orientation of regional assessment. Strategic assessments should be performed for broad policy issues. There should also be a legal requirement to conduct SEAs for plans, policies, and programs.

What should be the process and outcome of an early planning phase?

The process of an early planning phase should not be the responsibility of the proponent. All phases of environmental assessment should be under the purview of the single government agency responsible for assessing the projects. This early planning phase should also allow for the recognition of issues specific to First Nations. Furthermore, a record of comments and concerns raised by First Nations must be prepared at the end of this phase, including the rationale for the integration or rejection of comments.

What tools can we use to facilitate your participation and help you access the information you need in a user-friendly way?

The Participant Funding Program must be improved, including increasing the amounts granted to first Nations. Funding must also be granted earlier in the process to ensure upstream participation and engagement of First Nations. Recurrent funding must be granted to First Nations to support the establishment and maintenance of expertise within communities.

How do we respectfully and meaningfully incorporate Indigenous knowledge?

Indigenous knowledge should be formally recognized in the CEAA as a valid source for informed decision-making. Paragraph 20(1) of the *Access to Information Act* (R.S.C., 1985, c. A-1) could also be modified or interpreted internally as including the traditional knowledge as confidential technical information that cannot be disclosed.

[1] West Coast Environmental Law, "Federal Environmental Assessment Reform Summit. Executive Summary" (2016), online: https://www.wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_ExecSum+app_fnldigital.pdf

How do we provide greater confidence in the science behind project assessments?

Scientific investigations that are directly related to or initiated on behalf of project assessments must be carried out by impartial third parties who are not on the payroll of the project proponent. Additionally, any grey literature used in project assessments must be made fully public and accessible.

What criteria should be used to consider potential changes to the Project List, and how do we ensure transparency in the process?

The potential impacts of any project must be a core consideration at all times. Also, a project with significant adverse effects on First Nations should be considered as any other project designated under the *Regulations Designating Physical Activities*.

How can we work together to most effectively ensure the changes we implement support us on our shared path to reconciliation?

The goal of promoting reconciliation with Indigenous people does not demonstrate a sufficiently clear and formal commitment from the government. The federal government should seek to obtain a free, prior, and informed consent using distinct consultation processes, and to truly involve First Nations in the decision-making process. A provision should be added in the CEAA to this effect. The goal must be to recognize the status of Indigenous governments, and thus their implication in the decision process, and to include it into Canadian legislation.

What are the most important steps we should take to improve cooperation across jurisdictions?

Any substitution of project assessments with provincial and territorial processes must be guided by legislation to ensure that First Nations are involved upstream, are properly taken into account and are able to participate meaningfully in the decision process.

NATIONAL ENERGY BOARD

Some of the proposed changes are positive, such as the creation of a single government agency responsible for impact assessment and dropping the "standing" test that limited public participation in NEB processes. However, we have concerns about the following changes:

Changes to the National Energy Board Act

The *National Energy Board Act* must include the UNDRIP and recognize as a guiding principle the constitutional obligation of the government to protect the rights of First Nations. The interest of Indigenous peoples must also be specifically defined and integrated in the Act. First Nations must collaborate in creating this definition.

Maintaining the National Energy Board in Calgary, while eliminating the residency requirement for the Board and Hearing Commissioners.

While eliminating the residency requirement is positive, the National Energy Board's head office should return to Ottawa to limit the influence of industry on the organization.

Providing authority to make final decisions on certain functions such as import/export licenses, and variances or transfers to certificates and licenses.

The authority of agencies should be limited to their regulatory, monitoring and oversight role. To this effect, no decision-making authority should be assigned to them. Any final decision must rest with the Governor in Council.

Increasing Indigenous representation among the Board and Hearing Commissioners and requiring expertise in Indigenous knowledge.

All of the commissioners of the NEB must recognize the importance of First Nations participation in energy development. To this effect, training must be provided to all commissioners. Furthermore, all of the committees of the NEB must include Indigenous representatives possessing knowledge specific to the review of the different projects. A skills matrix must be developed in consultation with First Nations and must be used for the appointment of Indigenous commissioners.

Strengthening the approach for Indigenous peoples to build capacity for participation in processes and help coordinate Crown consultations

A long-term vision must be adopted to ensure capacity building among Indigenous peoples. This should include the implementation of training and skills development programs. Funding must also be increased, recurrent and adjusted according to the project's level of complexity.

NAVIGATION PROTECTION ACT

Improving the process for adding navigable waters to the Schedule

The act formerly known as the *Navigable Waters Protection Act* provided vital legal protection for all of Canada's navigable waters. The Schedule of navigable waters established through Bill C-45 in 2012 eliminated protection for over 99% of Canada's lakes and rivers. No amount of improving the process for adding navigable waters to this Schedule will even come close to restoring the pre-2012 level of protection.

Create a tailored process to add to the appendix the navigable waters included in their traditional territories.

If the appendix remains as was proposed, selection criteria for navigable waters will have to be revised in cooperation with First Nations. Selection criteria will need to be frequently reassessed to keep track of context.

Developing a complaint mechanism for works on unscheduled navigable waters to provide a means to address concerns about the public right of navigation

Rather than implementing an after-the-fact mitigation method for undesirable works, proponents must be required to provide a notice and opportunities to hold appropriate consultations before doing any construction work on any waterways. First Nations must be directly informed of any work before it begins.

FISHERIES ACT

We applaud the government's commitment to restoring the legal prohibition of harmful alteration, disruption or destruction (HADD) of fish habitat. We also welcome changes that would enhance enforcement powers, and build the capacity and develop expertise to protect fish and fish habitat.

Partnering with Indigenous peoples

The *Fisheries Act* must be amended to include the UNDRIP and to recognize as a guiding principle the constitutional obligation of the government to protect the rights of First Nations. Similarly, the priority of Aboriginal food fishing rights over other types of fisheries must be recognized. Restoration and sustainability objectives must also be added to the *Fisheries Act*.

"Aboriginal fisheries" must be legally defined. First Nations will need to collaborate to the definition of this term. "Aboriginal fishing licences" and "subsistence fisheries" will also have to be included in the definitions of the Fisheries Act, as supported by different judgments (e.g. Marshall).

In section 6 of the *Fisheries Act*, the first factor to consider should be the "interest of First Nations." This interest differ from the interest of the public, depending on the significance of Aboriginal fishing rights granted by Canadian jurisprudence, and should be considered as a priority over other factors.

Enhance the participation of Indigenous peoples in the conservation and protection of fish and fish habitats

A long-term vision must be adopted to ensure capacity building of Indigenous peoples. This includes the implementation of training and skills development programs. Monitoring and law enforcement powers may be delegated to First Nations. Funding must also be increased, recurrent and adjusted according to the project's level of complexity.